

The Administrative Law Judge (ALJ) awarded claimant compensation for a 20 percent whole person functional impairment and further determined that claimant failed to meet her burden of proof that a longevity payment should be included in the calculation of her average gross weekly wage.

Claimant requests review and argues that the longevity payment was additional compensation that should have been included in the calculation of her average gross weekly wage. Claimant further argues that she is entitled to compensation for a 30 percent whole person functional impairment based upon the rating provided by Dr. Paul Stein.

Conversely, respondent argues claimant's functional impairment rating should be reduced to a 5 percent whole person functional impairment based upon the rating provided by Dr. John Fan. Respondent further argues the Board should affirm the ALJ's determination that claimant failed to meet her burden of proof that the longevity pay should be included in the calculation of the average gross weekly wage as there was simply no evidence provided to explain the nature of the longevity payment.

The two issues for Board determination on claimant's application for review are the nature and extent of claimant's whole person functional impairment¹ and claimant's average gross weekly wage.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

Briefly stated, claimant has been employed as a mental health technician by respondent for more than 20 years. On August 23, 2008, she injured her neck, shoulder, arm and left wrist when she intervened in a physical altercation between a patient and a co-worker.

As a result of the injuries claimant suffered in the work-related incident she ultimately underwent two surgeries. On December 4, 2008, Dr. Jonathan Loewen performed surgery to repair a triangular fibrocartilaginous complex tear in claimant's left wrist. On August 3, 2009, Dr. Raymond Grundmeyer performed a two-level decompression, discectomy and fusion at C3-4 and C4-5 on claimant's neck. Claimant was released from Dr. Grundmeyer's care on November 3, 2009. He placed restrictions on claimant of no lifting greater than 40 pounds, no extreme flexion or extension of the neck, no reaching above her head and only minimal patient contact.

Claimant has returned to her full-duty employment with respondent as a mental health technician. She still complains of discomfort and pain in her left wrist, weakness in her arm and shoulder as well as loss of flexion and rotation in her neck.

¹ The claimant returned to work for respondent at the same wage as her pre-injury average gross weekly wage so she did not allege entitlement to a work disability (a permanent partial general disability greater than the functional impairment).

Dr. Paul Stein, a board certified neurosurgeon, examined and evaluated claimant on April 1, 2010, at the request of claimant's attorney. The doctor took a history of claimant and also reviewed her medical records. A cervical MRI scan and postoperative CT scan were also reviewed. Upon physical examination, the doctor found that claimant's injuries were consistent with the history and the surgeries performed. Dr. Stein diagnosed claimant with a torn triangular fibrocartilage injury and a two-level anterior cervical discectomy and fusion for the neck injury. The doctor opined claimant was at maximum medical improvement.

Based on the *AMA Guides*², Dr. Stein rated claimant's cervical spine at 25 percent to the body as a whole which placed her in the DRE Cervicothoracic Category IV. For the 20 percent decreased grip strength in the left wrist, the doctor gave her a 10 percent left upper extremity impairment. The 10 percent left upper extremity converts to a 6 percent whole person impairment. Using the Combined Values Chart, Dr. Stein opined claimant had a 30 percent whole person impairment. The doctor recommended that claimant permanently avoid repetitive overhead activity or activity requiring repetitive bending and twisting of the neck. Claimant should also avoid frequently repetitive use of the left hand with flexion-extension of the wrist.

Dr. John Fan examined and evaluated claimant on April 9, 2010, at respondent's insurance carrier's request. Claimant was having complaints of chronic neck pain. Upon physical examination, the doctor noted claimant had diffuse tenderness to palpation in the lower cervical spine and limited range of motion. Dr. Fan reviewed previous medical records and radiographics such as multiple cervical spine x-rays and MRI. The doctor diagnosed claimant with neck pain, cervical degenerative disk disease at C3-4 and C4-5 levels, left-sided upper extremity radiculopathy, and status post anterior C3-4 and C4-5 discectomy and anterior fusion. The doctor opined claimant had reached maximum medical improvement. Based on the *AMA Guides*, Dr. Fan rated claimant's cervical spine at 5 percent whole person impairment.

Initially, claimant argues the ALJ failed to include a longevity payment in the calculation of the claimant's average gross weekly wage. There is no dispute that claimant's base wage was \$515.39. It is disputed whether an \$850 longevity payment claimant received on April 5, 2008, should be considered in the calculation of claimant's average gross weekly wage.

At the regular hearing a wage statement was offered as an exhibit.³ Under a column denominated "Longevity Addl-Comp" there was a payment of \$850 on April 5, 2008. As

² American Medical Ass'n, *Guides to the Evaluation of Permanent Impairment* (4th ed.). All references are based upon the fourth edition of the *Guides* unless otherwise noted.

³ R.H. Trans., Cl. Ex. 1.

the ALJ noted, there was no further testimony in the evidentiary record to explain the nature of that payment.

The parties each cited a Board decision to support their respective positions whether the longevity payment should be included in the calculation of the average gross weekly wage. In *Turner v. State of Kansas*, Docket No. 1,039,060, claimant argued that her longevity “bonus” should be included in the calculation of her average gross weekly wage. The ALJ noted that K.S.A. 44-511(a)(2) provides that additional compensation (which includes cash bonuses) is not included in the calculation of the average gross weekly wage until such remuneration is discontinued. There was no indication that the longevity bonus had been discontinued.⁴ Because claimant continued to work for respondent the ALJ did not include the longevity bonus in claimant’s average gross weekly wage calculation. The Board affirmed that determination.

In *Scaife v. State of Kansas*, Docket No. 1,042,765, claimant argued that her longevity “bonus” was additional compensation that would be paid yearly as long as claimant’s employment with respondent continued. As in this case, the payment was identified as longevity additional compensation. But in *Scaife* there was evidence that claimant would receive the same or higher payment yearly as the result of his tenure with respondent. The ALJ concluded that the guaranteed payment instead of being seen as a bonus under K.S.A. 2008 Supp. 44-511(a)(2)(B), was a guaranteed supplement to claimant’s wages. Consequently, the ALJ included the additional compensation in the calculation of claimant’s average gross weekly wage. The Board affirmed.

A Board decision in any case before it is based upon the evidence had and presented to the ALJ in that case. And just as in the aforementioned cases or the instant case, it is the evidentiary record that controls the decision. In the instant case, the evidentiary record establishes that claimant received a single payment of \$850 on April 5, 2008, which was designated “longevity Addl-comp”. There is simply no additional evidence to explain the nature of the \$850 payment. Was it a one time payment? Was it a recurring payment? Was it an additional compensation bonus? As the ALJ determined, absent additional evidence to explain the payment, the claimant has failed to meet her burden of proof to establish that the payment should be included in the calculation of her average gross weekly wage. Based upon this evidentiary record the Board agrees the claimant has failed to meet her burden of proof and affirms.

The claimant next argues she is entitled to compensation for a 30 percent whole person functional impairment based upon the rating provided by Dr. Paul Stein.

Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by

⁴ See, K.S.A. 44-511(a)(2) and K.S.A. 44-511(a)(2)(B).

competent medical evidence and based on the fourth edition of the American Medical Association *Guides to the Evaluation of Permanent Impairment*, if the impairment is contained therein.⁵

The Board, as a trier of fact, must decide which testimony is more accurate and/or more credible and must make the ultimate decision as to the nature and extent of injury. And the Board is not bound by the medical evidence presented but must adjust the medical testimony along with the testimony of the claimant and any other testimony that might be relevant to the question of disability.⁶

The Kansas Supreme Court has held that if the injury is both to a scheduled member and to a nonscheduled portion of the body, the disabilities should be combined and compensation should be awarded under K.S.A. 44-510e.⁷

The ALJ indicated that Dr. Stein “cited the 5th edition of the Guides, for the proposition that a cervical fusion automatically establishes a Category IV impairment.” The ALJ then averaged Dr. Stein’s 25 percent rating with Dr. Fan’s 5 percent cervical rating. If Dr. Stein relied upon the 5th Edition of the Guides then his rating would not comply with the statutory requirement that physicians use the 4th edition and his rating should not have been considered.

Dr. Stein explained his rating in the following fashion:

Q. Can you just go through those with us?

A. Yes. She sustained an injury to the left wrist, but I’m not certain exactly what the injury was or exactly what the surgery was because the records were not complete in that regard. She did have a two-level discectomy for disc disease which was aggravated or caused by the accident, based on the history from the patient, and I felt that she was at maximum medical improvement.

Impairment was provided using the Fourth Edition of the AMA Guides to the Evaluation of Permanent Impairment. She had a 25 percent whole person impairment under Diagnosis Related Category IV because of the cervical fusion and loss of motion at the two levels of the fusion. For the left wrist, as I indicated, she had a good range of motion, but she had decreased grip strength measured by dynamometer on three separate settings and referring to the Guides, Table 32 on

⁵ K.S.A. 44-510e(a).

⁶ *Tovar v. IBP, Inc.*, 15 Kan. App. 2d 782, 817 P.2d 212, rev. denied 249 Kan. 778 (1991); *Graff v. Trans World Airlines*, 267 Kan. 854, 983 P.2d 258 (1999).

⁷ *Bryant v. Excel Corp.*, 239 Kan. 688, 689, 722 P.2d 579 (1986). See also *Goodell v. Tyson Fresh Meats*, 43 Kan. App. 2d 717, 235 P.3d 484 (2009); *McCready v. Payless Shoesource*, 41 Kan. App. 2d 79, 200 P.3d 479 (2009).

page 65, she had a 20 percent strength loss index and using table 34, that became a 10 percent impairment to the left upper extremity.

I believe there is an error in the next paragraph. It says here 10 percent left upper extremity impairment becomes three percent whole person. Let me double check that because my recollection is it's six. Yes, 10 percent actually should be six percent whole person.⁸

Dr. Stein then testified that combining the 6 percent and 25 percent would result in a 30 percent whole person impairment rating.

On cross-examination, Dr. Stein was again asked to explain the basis for his rating. The doctor testified:

Q. Now, Doctor, turning to the cervical injury. Could you explain the basis for your rating?

A. Yes. The AMA Guides provide an impairment rating for loss of motion segment integrity which is Diagnosis Related Category IV. The primary purpose of that is for people who have excessive movement at a level because of ligamentous injury or joint capsular injury, and there are requirements by the Guide in terms of the difference in movement between two adjacent segments. On the other hand, if you fuse a segment, and particularly if you fuse two segments, there will be some movement at those segments, there will be movement at the segment above and if you actually did flexion/extension x-rays on them, the difference in movement would be enough to categorize that as a loss of motion segment integrity. Additionally, I know that Kansas uses the 4th Edition, but if you look at the 5th Edition, the AMA Guides finally -- I don't know if I want to use the word "categorize," but they finally made it simpler and said if you've had a fusion or an attempt at a fusion you're Category IV. So you don't have to do the measurements and things like that. As far as I know, just about everybody whose reports I have seen using the 4th Edition for somebody who has a fusion would put them in Category IV.⁹

Dr. Stein clearly based his cervical rating upon loss of motion segment integrity at two levels. The doctor's gratuitous reference to the 5th edition was apparently added to corroborate his rating but did not invalidate the rating he provided pursuant to the 4th edition for loss of motion segment integrity.

As noted by the ALJ, Dr. Fan never testified as his report and rating opinion were admitted, without objection, during Dr. Stein's deposition. Dr. Fan neither rated nor examined claimant's wrist and rated claimant's neck complaints at 5 percent pursuant to DRE Cervicothoracic Category II. After reviewing the entire evidentiary record, the Board

⁸ Stein Depo. at 11-12.

⁹ *Id.* at 20-21.

finds Dr. Stein's opinion more persuasive in this instance and adopts his 30 percent whole person rating for claimant.

AWARD

WHEREFORE, it is the decision of the Board that the Award of Administrative Law Judge Bruce E. Moore dated October 27, 2010, is modified to find claimant suffered a 30 percent whole person impairment.

Claimant is entitled to 15.15 weeks of temporary total disability compensation at the rate of \$343.61 per week or \$5,205.69 followed by 124.46 weeks of permanent partial disability compensation at the rate of \$343.61 per week or \$42,765.70 for a 30 percent functional disability, making a total award of \$47,971.39.

As of February 28, 2011, there would be due and owing to the claimant 15.15 weeks of temporary total disability compensation at the rate of \$343.61 per week in the sum of \$5,205.69 plus 116.14 weeks of permanent partial disability compensation at the rate of \$343.61 per week in the sum of \$39,906.87 for a total due and owing of \$45,112.56, which is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining balance in the amount of \$2,858.83 shall be paid at the rate of \$343.61 per week for 8.32 weeks or until further order of the Director.

IT IS SO ORDERED.

Dated this _____ day of February 2011.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Scott J. Mann, Attorney for Claimant
Christopher J. Shepard, Attorney for Respondent and its Insurance Carrier
Bruce E. Moore, Administrative Law Judge